90-1120

Supreme Court, U.S.
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NO. _____

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1990

LEON GARMON,

*Petitioner*

- VERSUS -

THE ALABAMA STATE BAR,

*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the creation of the position of Etowah County "Domestic Referee" or "Master/Referee," which said referee enters purported judicial and quasi-judicial orders in contested domestic relations cases filed in the Circuit Court of Etowah County under the presumed authority of his appointment to that position by the Presiding Circuit Judge of the 16th Judicial Circuit (Etowah County) of Alabama, is void *ab initio* as repugnant to the due process clause of the 14th Amendment to the United States Constitution.

2. Whether Leon Garmon's conviction by the Disciplinary Board of the Alabama State Bar, and the affirmance of that conviction by the Supreme Court of Alabama, for violating an attorney disciplinary rule proscribing conduct which is "degrading or discourteous to a tribunal" is invalid because the "Domestic Referee" or "Master/Referee" before whom Leon Garmon engaged in that conduct was not a duly and properly constituted "tribunal."

## LIST OF PARTIES

All parties to this case are listed in the caption. The Alabama State Bar is a creation of the Legislature of Alabama, Ala. Code § 34-3-40, et seq. (creating the Board of Bar Commissioners), and its actions in this case are taken by and under the authority and law of the State of Alabama. Ala. Code §§ 34-3-80, 34-3-81.[1] Thus, 28 U.S.C. § 2403 (b) may be involved and the Attorney General of Alabama, while not a party to this case, has been served with this Petition as required by Rule 29.4(c) of the Rules of this Court.

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[1]Unless otherwise noted, citations to the statutory law of Alabama are to the *Code of Alabama* (1975), as amended, adopted as the official codification of the acts of the Alabama Legislature on February 17, 1977, by Act No. 20, Alabama Acts, Regular Session 1977.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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### OPINIONS BELOW

The opinion of the Supreme Court of Alabama, dated September 14, 1990, is reproduced in the Appendix to this Petition. App. A-1. That decision and opinion has not yet been published in the official reporter of that court but is published unofficially at 24 Ala. Bar Rep. 4289 (1990). The decision of the Supreme Court of Alabama overruling, without comment or opinion, Leon Garmon's Application for Rehearing, dated October 17, 1990, is also reproduced in the Appendix to this Petition. App. A-6. That decision has not yet been published but will be later published at ___ Ala. Bar. Rep. ___ (1990) and ___ So.2d ___ (Ala. 1990). The "Findings and Order for Public Censure" of Leon Garmon by the Disciplinary Board of the Alabama State Bar, dated March 22, 1990, which formed the basis of Leon Garmon's appeal to the Supreme Court of Alabama, have not been published but are reproduced in the Appendix to this Petition. App. A-7.[2]

### JURISDICTION

The appellate jurisdiction of this Court under 28 U.S.C. § 1257(3) is invoked in this case because the Alabama Supreme Court's September 14, 1990, decision (App. A-1) and October 17,

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[2]Though not determinative of this Petition, it should be noted that there are presenting pending two cases in other courts which directly challenge the constitutionality of the position of the "Domestic Referee": *Tallant, et al. vs. Higgins, et al.*, CV-90-AR-1578-M, in the United States District Court for the Northern District of Alabama, which is presently on appeal to the 11th Circuit Court of Appeals, number 90-7757, from the District Court's order granting summary judgment to Higgins; and *Williams, et al. vs. Higgins*, CV-88-552, in the Circuit Court of Etowah County, Alabama, in which the trial judge granted "final judgment" to Higgins on November 14, 1990, refusing to review the validity of Higgins' position because no other state or federal court had considered the question. This "Final Judgment" is included in the Appendix. App. A-4. Neither of these cases is ripe for prosecution in this Court nor for consolidation with this Petition under Rule 12.2.

1990, order overruling Leon Garmon's application for rehearing (App. A-7) necessarily upheld, against Leon Garmon's federal constitutional challenge, the creation, existence and operation of the position of Etowah County "Domestic Referee" or "Master/Referee" as a duly and properly appointed and constituted "tribunal," as that term is used in the Code of Professional Responsibility of the Alabama State Bar and which said Code of Professional Responsibility was given the force of law by the Alabama Legislature in Section 34-3-80 and Section 34-3-81 of the *Code of Alabama* (1975). Leon Garmon's federal constitutional challenge to the creation, existence and operation of the position of Etowah County "Domestic Referee" is presented to this Court as Question 1. The question of the constitutionality of the creation, existence and operation of the Etowah County "Domestic Referee" or "Master/Referee" was presented to both the Disciplinary Board of the Alabama State Bar and the Supreme Court of Alabama and the decisions of the Supreme Court of Alabama on that question are properly reviewable by this Court by certiorari.

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution, the Alabama Constitution of 1901, and the Code of Professional Responsibility of the Alabama State Bar are as set forth below:

1. Section 1 of the 14th Amendment to the United States Constitution provides in pertinent part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Section 13 of Article I of the Alabama Constitution of 1901 provides as follows:

> That all courts shall be open; and that every person, for any injury done him, in his hands, goods, person, or

> reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.

3. Amendment 328 (Article VI), Section 6.11 of the Alabama Constitution of 1901 provides as follows:

> The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify that substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided, further, that the right of trial by jury as at common law and declared by section 11 of the Constitution of Alabama 1901 shall be preserved to the parties inviolate. These rules may be changed by a general act [of the legislature] of statewide application.

4. Disciplinary Rule DR 7-106(B)(2) of the Code of Professional Responsibility of the Alabama State Bar, provides as follows:

> (B) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> . . .
>
> (2) Engage in undignified or discourteous conduct which is degrading to a tribunal.

DR 7-106(B)(2), as a part of the Code of Professional Responsibility of the Alabama State Bar, was adopted by the Supreme Court of Alabama on May 6, 1974, and amended on August 28, 1974, 293 Ala. XXIII, LXXIX (1974), as was required by Title 46, Section 34 of the *Code of Alabama* (1940, Recomp. 1958), then in effect and now required by Section 34-3-81 of the *Code of Alabama* (1975).

All other constitutional, statutory and regulatory provisions not directly involved but which do bear on the resolution of this case are set out at length in the Appendix to this Petition, *infra*.

## STATEMENT OF THE CASE

Petitioner, Leon Garmon, is an Attorney at Law, being a member of the Bar of the Supreme Court of Alabama and of this Court, who has actively practiced law since 1976 in the courts of Alabama and the federal courts and who has maintained and does now maintain his office for the practice of law in Gadsden, Etowah County, Alabama. On March 22, 1990, Leon Garmon was found guilty by the Disciplinary Board of the Alabama State Bar, which is a state agency created by the Alabama Legislature and functioning as an integrated bar, of violating Disciplinary Rule DR 7-106(B)(2) of the Code of Professional Responsibility of the Alabama State Bar.

Specifically, Garmon was found by the Board to have "engage[d] in undignified or discourteous conduct which is degrading to a tribunal" in connection with his representation of a litigant who appeared before the Etowah County "Domestic Referee" or "Master/Referee" in a hearing seeking *pendente lite* relief in a contested divorce case then presently pending in the Circuit Court of Etowah County.

The Alabama State Bar (the "Bar") initiated an investigation into Garmon's alleged misconduct upon receipt of a February 10, 1988, ethics complaint filed by Ronald C. Higgins, who was and remains the "Domestic Referee" or "Master/Referee" of Etowah County. Higgins' complaint alleged that Garmon had taken certain actions and made comments immediately after that *pendente lite* hearing which were "a serious display of contempt for [Higgins'] position as Domestic Referee and a violation of Ethical Consideration EC 7-36 and Disciplinary Rule DR 7-106(B)(2)."

Disciplinary Rule DR 7-106(B)(2) of the Code of Professional Responsibility states that "[i]n appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal." This Disciplinary Rule was promulgated by the Board of Bar Commissioners of the Alabama State Bar, a legislatively created agency of the State of Alabama, Ala. Code § 34-3-40, et seq., and has the force of law by virtue of Sections 34-3-80 and 34-3-81 of the *Code of*

*Alabama* (1975), and their predecessor, Title 46, Section 34 of the *Code of Alabama* (1940, Recomp. 1958), and its adoption by the Supreme Court of Alabama. 293 Ala. XXIII, LXXIX (1974).

Higgins detailed his complaint against Garmon as follows, viz:

> After all the evidence had been submitted and both sides had stated they had nothing further to submit, I began to make some comments pertaining to the findings I would make in the case. Mr. Leon Garmon, the attorney for one of the parties, interrupted me and in a loud voice and an insolent tone, began to insult me personally. I then stated to all persons present that I had nothing further to say and would announce my findings at a later date and requested that everyone leave. Both parties and the other attorney went to the door of my office to leave; however, Mr. Garmon continued to berate and insult me. Although Mr. Garmon never overtly threatened to physically assault me, I began to feel intimidated and told him unless he left that I would call for a deputy sheriff to remove him. When I finally put my hand on the telephone receiver, Mr. Garmon calmed down and finally left my office.

After demand by Garmon under the Alabama Rules of Disciplinary Enforcement that it do so, the Bar filed a formal disciplinary complaint against Garmon in this matter.

Garmon answered the Bar's complaint by affirmatively averring, *inter alia*, that the Etowah County "Domestic Referee" or "Master/Referee" was not a duly and properly appointed and constituted "tribunal" and that, as a matter of law, Garmon could not be guilty of having "engage[d] in undignified or discourteous conduct which is degrading to a tribunal" in violation of DR 7-106(B)(2).

In a motion for summary judgment, Garmon contended that he was entitled to judgment as a matter of law because the Etowah County "Domestic Referee" or "Master/Referee" was not a "tribunal" as that term is used in the Disciplinary Rule since the position was created without authority of law, in violation of the litigants due process rights to have their domestic relations cases heard by a fully qualified judge, and that Higgins' appointment

to that illegal position was void *ab initio* and wholly without legal effect. The Disciplinary Board denied the motion for summary judgment without comment, thereby determining *sub silencio* that the "Domestic Referee" was a "tribunal."

After an *ore tenus* hearing, the Disciplinary Board found Garmon guilty of violating DR 7-106(B)(2), viz: Engaging in "undignified or discourteous conduct which is degrading to a tribunal" in his appearance before Domestic Referee Higgins in that *pendente lite* divorce hearing. In accordance with the power granted to it by the Alabama Rules of Disciplinary Enforcement, the Disciplinary Board set Garmon's discipline at a public censure.

Thereafter, Garmon filed with the Disciplinary Board a motion for judgment notwithstanding the verdict or, in the alternative, a new trial under the Alabama Rules of Civil Procedure. Among other things, Garmon's motion stated that the Disciplinary "Board erred in its *sub silencio* determination that the Etowah County 'Domestic Referee' or 'Master/Referee' was a 'tribunal' as that term is used in Disciplinary Rule [DR] 7-106(B)(2) of the Code of Professional Responsibility of the Alabama State Bar." The Disciplinary Board also denied that motion without comment.

As provided by the Alabama Rules of Disciplinary Enforcement, Garmon then timely appealed the findings of the Disciplinary Board directly to the Supreme Court of Alabama. In that appeal, the following issues were asserted by Garmon and briefed by the parties, viz:

> I. Whether the "Domestic Referee" or "Master/Referee" of Etowah County is a "tribunal" as that term is used in the Alabama Code of Professional Responsibility [of the Alabama State Bar].
>
> II. Whether Leon Garmon's actions and statements on January 5, 1988 [the date of *pendente lite* hearing], in the presence of Ronald C. Higgins, in his capacity as "Domestic Referee" or "Master/Referee" of Etowah County, which allegedly caused Higgins "to feel intimidated" rise to the level of "undignified or discourteous

conduct which is degrading to a tribunal" which "adversely reflects on his fitness to practice law."

Before that court, Garmon argued that the "Domestic Referee" or "Master/Referee" of Etowah County was not a duly and properly constituted "tribunal" since the position was created illegally and wholly without the authority of law. Further, Garmon argued that the continued existence and operation of the position of Etowah County "Domestic Referee" or "Master/Referee" was in violation of the due process rights of the litigants who appear before that referee to have their cases heard by a fully qualified and duly constituted judge, and that the utter lack of authority for the position of "Domestic Referee" or "Master/Referee" rendered that position something less than a "tribunal." Also, the actual day-to-day operation of the position of "Domestic Referee" or "Master/Referee" was in violation of the parties' rights since the referee operated in flagrant violation of the referral provisions of Rule 53 of the Alabama Rules of Civil Procedure (Ala.R.Civ.P.) and contrary to the statutory law of Alabama and the Alabama and federal cases interpreting Rule 53. Rule 53, Ala.R.Civ.P., is set out at length in the appendix to this Petition. App. A-11.

On September 14, 1990, the Supreme Court of Alabama released its decision and opinion in which that court, by a five-to-none vote of a panel of the court, affirmed the findings of the Disciplinary Board and the discipline imposed upon Garmon.

Justice Gorman Houston, for the court, wrote as follows:

> Even assuming, however, that Higgins's appointment as a referee was not proper under Rule 53(b) [Ala.R. Civ.P.], and that fact may have provided the defendant with a ground for appeal in [the underlying domestic relations case], Higgins's status as a "tribunal" within the meaning of DR 7-106(B)(2) was not affected. "Tribunal" is variously defined in both lay and legal dictionaries as the seat of a court or the place where justice is administered. See *The American Heritage Dictionary of the English Language* (1969) and *Black's Law Dictionary* (5th ed. 1979). Amendment 328 (Article VI), § 6.11, of the Alabama Constitution authorized this Court to promul-

> gate rules governing the administration of, and the practice and procedure in, all of the courts in this State. Rule 53 specifically authorizes the appointment of referees to facilitate the resolution of domestic relations cases in the circuit courts. Even a cursory review of Rule 53 shows that a referee acts as an arm of the circuit court and, in doing so, is vested with the authority to conduct hearings, compel the attendance of witnesses, impose certain sanctions, and make findings of fact and conclusions of law. Higgins was acting as a "tribunal" within the meaning of DR 7-106(B)(2) at the time of the incident in question.

In accordance with the Alabama Rules of Appellate Procedure, Garmon made a timely application for rehearing to the Alabama Supreme Court of its September 14, 1990, decision, and in that application asserted, among others, the following grounds for rehearing, viz:

> A. The issues raised in this appeal concern the validity *vel non* of the constitutional and legal validity of the "creation" and function of the Etowah County "Domestic Referee" or "Master/Referee" and those issues are not resolved by this Court's narrow interpretation of its scope or review of this case.
>
> B. The Court erred in determining that the position of "Domestic Referee" or "Master/Referee" is a "tribunal," as that term is used in the Code of Professional Responsibility of the Alabama State Bar in that there is *no constitutional or statutory basis for the existence of said position* and, therefore, the said "Domestic Referee" or "Master/Referee" *cannot, as a matter of law,* be a properly constituted and appointed "tribunal."
>
> C. The operation of and the actions taken by the Etowah County "Domestic Referee" or "Master/Referee" in domestic relations cases in the Etowah County Circuit Court are in violation of the substantive due process rights, as secured by the 14th Amendment to the United States Constitution, *of the parties and attorneys who appear before the said referee.*

> D. This Court's decision and opinion dated September 14, 1990, *does not address the question* of the constitutionality or legality of the creation or functioning of the position of "Domestic Referee" or "Master/Referee" of the 16th Judicial Circuit of Alabama (Etowah County) and this Court's failure to address this question allows the said "Domestic Referee" or "Master/Referee" to continue to operate in a "business and exists wholly without authority of law.

(emphasis in original). Garmon's application for rehearing was overruled by the Alabama Supreme Court on October 17, 1990, without comment or opinion. (App. A-6). This Petition for Certiorari now follows.

## SUMMARY OF ARGUMENT

Before both the Disciplinary Board of the Alabama State Bar and in the Supreme Court of Alabama, Petitioner Leon Garmon clearly and unequivocally challenged the constitutionality of the position of Etowah County "Domestic Referee" or "Master/Referee" because that position's creation, existence and operation violates the due process rights of the parties and attorneys who are compelled to appear before him as those rights are secured by the 14th Amendment to the United States Constitution and Section 13 of Article 1 of the Constitution of Alabama of 1901. Even though the Alabama Supreme Court chose not to address the constitutional challenge, Garmon's raising that issue in the court below is sufficient to invoke this Court's jurisdiction under Title 28, United States Code, Section 1257 (3).

There is no authority under the Constitution or laws of Alabama, or the rules governing procedure in Alabama's courts, for a full-time state-paid "Domestic Referee" who acts purportedly as an adjunct of the circuit court in domestic relations cases. The operation of a position to which contested domestic relations cases, and proceedings ancillary to those cases, are routinely referred, without regard to the merits and circumstances of the individual cases, is an unlawful abdication of judicial power so

violative of the parties' and attorneys' right to a trial before a duly qualified judge as to be *per se* unconstitutional.

Because of the unconstitutionality of the position of "Domestic Referee" that position is not a "tribunal," as that term is used in the rules governing the conduct of attorneys in Alabama, and Garmon's conviction for "engag[ing] in undignified or discourteous conduct which is degrading to a tribunal" in his appearance in a professional capacity before the "Domestic Referee" is in derogation of Garmon's due process rights. The Supreme Court of Alabama's decision affirming Garmon's conviction is due to be reversed and set aside.

## ARGUMENT

### I.

### THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE THE QUESTIONS PRESENTED FOR REVIEW

Section 25 of the Judiciary Act of 1789 granted to this Court jurisdiction over and the power to review any "final judgment or decree in any suit" rendered by the highest court of any state in which the suit could be brought. 1 Stat. 73, 75. The present version of Section 25 which is applicable to this case, 28 U.S.C. § 1257 (3), grants this Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had by "writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Court will have jurisdiction over a case only if either the constitutionality of a statute is "drawn into question" or a right, title, privilege or immunity under the United States Constitution is "set up or claimed." This standard is met where such a constitutional question has been "either raised or squarely considered

and resolved in the state court. [citations omitted]." *Illinois v. Gates*, 462 U.S. 213, 218, fn.1 (1983). The Court in *Illinois v. Gates* quoted with approval the earlier holding of *Dewey v. Des Moines*, 173 U.S. 193 (1899), in which "the Court said that '[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to now be raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed. [footnote omitted]." 173 U.S. at 197-198, *quoted in Illinois v. Gates*, 462 U.S. at 219-220.

The Alabama Rules of Appellate Procedure, (Ala.R.App.P.), which were adopted by the Supreme Court of Alabama on June 17, 1975, 294 Ala. XXI (1975), and which govern this case in the court below, state that "[a]ssignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 [Ala.R.App.P.] shall be sufficient." Rule 20, Ala.R.App.P.

Garmon clearly and unequivocally challenged the constitutionality of the creation, existence and operation of the Etowah County "Domestic Referee" or "Master/Referee" in his appeal to the Supreme Court of Alabama of the findings of and discipline imposed by the Disciplinary Board of the Alabama State Bar. In his initial brief to that court, Garmon's statement of the issues presented to the court the question of "whether the 'Domestic Referee' or 'Master/Referee' of Etowah County is a 'tribunal' as that term is used in the Alabama Code of Professional Responsibility." Under the aegis of that issue, Garmon argued that the creation, appointment, continued existence, operation and actions of the Etowah County "Domestic Referee" violated the due process rights of the parties and the attorneys who were compelled to appear before him as those rights are secured by the 14th Amendment to the United States Constitution and Section 13 of Article I of the Constitution of Alabama of 1901. Garmon raised the constitutional question in the lower court and the fact

that the court chose not to address the question does not lend itself to an inference that Garmon abandoned the issue.

Indeed, Garmon pointed out the omission of a decision on or even discussion of the constitutional question to the Alabama Supreme Court in his application for rehearing when he stated that the "Court's decision and opinion dated September 14, 1990, *does not address the question* of the constitutionality or legality of the creation or functioning of the position of 'Domestic Referee' or 'Master/Referee' of the 16th Judicial Circuit of Alabama (Etowah County)."

Garmon continued to insist on his assertion of the constitutional infirmity of the position of "Domestic Referee" by urging, *inter alia*, that:

> 3. [The Alabama Supreme Court] erred in determining that the position of "Domestic Referee" or "Master/Referee" is a "tribunal," as that term is used in the Code of Professional Responsibility of the Alabama State Bar in that there is *no constitutional or statutory basis for the existence of the said position* and, therefore, the said "Domestic Referee" or "Master/Referee" *cannot, as a matter of law*, be a properly constituted and appointed "tribunal"
>
> 4. The [constitutional] issue presented in this case is one of first impression in Alabama. . . .
>
> . . .
>
> 6. The issues raised in this appeal concern the validity *vel non* of the constitutional and legal validity [sic] of the "creation' and function of the Etowah County "Domestic Referee" or "Master/Referee." . . .
>
> 7. The operation of and the actions taken by the Etowah County "Domestic Referee" or "Master/Referee" in domestic relations cases in the Etowah County Circuit Court are in violation of the substantive due process rights, as secured by the 14th Amendment to the United States Constitution, *of the parties and attorneys who appear before the said referee.* The actions of the referee

> in this case and in the underlying domestic relations case . . . are capable of being taken only be a court of record, that is, a fully qualified circuit judge, and the purported judicial findings, decisions and orders of the "Domestic Referee" or "Master/Referee" are, therefore, void *ab initio* and of no binding legal effect upon either [the party or his attorney] Leon Garmon.

(emphasis in original). In overruling the application for rehearing without opinion by a five-to-none vote, the court below did not state whether it "considered and resolved" the constitutional question, or whether it considered that question properly "raised." *Illinois v. Gates*, 462 U.S. at 213, fn.1. There cannot, however, be any serious argument that Garmon did not raise the constitutionality of the position of Etowah County "Domestic Referee" in the court below.

## II.

## THE CREATION AND EXISTENCE OF THE POSITION OF ETOWAH COUNTY DOMESTIC REFEREE IS VOID *AB INITIO* AS REPUGNANT TO AND VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The position of Etowah County "Domestic Referee" or "Master/Referee" was created on May 11, 1982, by the Alabama Administrative Office of Courts (AOC) at the specific personal request of the Presiding Circuit Judge of the 16th Judicial Circuit (Etowah County) of Alabama, the Honorable Julius S. Swann, Jr. The position was created under the presumed authority of Section 12-15-6 of the *Code of Alabama* (1975), as amended, and Rule 53, Ala.R.Civ.P., and was designated a "Court Referee I" apparently for pay and accounting purposes. Section 12-15-6 is set out at length in this Petition, *infra*. The referee is a "confidential"-personal employee of Judge Swann who serves at the pleasure of Judge Swann.

On January 18, 1983, Judge Swann, in his capacity as Presiding Circuit Judge, appointed Ronald C. Higgins "Domestic Referee for the Sixteenth Judicial Circuit of Alabama," and Higgins was promptly placed on "the State payroll." Ronald C. Higgins has held the position of "Domestic Referee" or "Master/Referee" continuously since his appointment in 1983 and he is the only person to occupy that position since its creation. In conformity with the Southern Populist tradition, except for municipal court judges, "[a]ll judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts." Ala. Const. Amend. 328, § 6.13. Higgins' tenure as "Domestic Referee," contrary to the requirements of law for judges in Alabama, is by appointment. He is not subject to election by the voters of Etowah County, and he serves for an apparently indefinite term. There is no Alabama statutory, regulatory or case law which authorizes a judicial or quasi-judicial position such as the full-time state-paid "Domestic Referee" or any position arguably analogous to that position.

The job description for the Etowah County "Domestic Referee" or "Master/Referee" furnished by the Administrative Office of Courts (AOC) states that the "Domestic Referee" performs "professional legal work in conducting informal judicial hearings in juvenile and civil cases." Further, as "examples of work performed," AOC states that the "Domestic Referee":

> Acts as a court referee in *juvenile cases*; conducts preliminary and detention hearings involving the disposition, custody and control or protection of delinquent, dependent or neglected children; accepts pleas of guilty and makes determinations regarding probation, length of substance and place of confinement; drafts conclusions and recommendations and submits to all parties involved and to the judge for review.
>
> Acts as a court referee in *circuit civil cases*; conducts reference primarily in divorce actions which involve making determinations regarding custody of children, visitation rights, amount of temporary support, division of property and financial assets; drafts conclusions and recommendations and submits to the judge for review.

(emphasis added). The "job description" provided by AOC neither cites nor references any rule, state or constitutional provision as authority for the creation and function of a standing full-time, state-paid "Domestic Referee" or "Master/Referee," but it does state that the appointee shall have "[t]en years experience as a court referee as provided in Section 5-104(a) of Act No. 1205, Acts of Alabama, Regular Session 1975 or Certificate of Admission to the Alabama State Bar and experience at Attorney I level, or experience as a practicing attorney." Section 5-104(a) of Act No. 1205, Acts of Alabama, Regular Session 1975 is codified as Section 12-15-6 of the *Code of Alabama* (1975). The "job description" for the position of "Domestic Referee" or "Master/Referee" is reproduced in whole in the Appendix. App. A-15.

Section 12-15-6 of the *Code of Alabama* (1975) codified Section 5-104 of Act No. 1205, Acts of Alabama, Regular Session 1975, which said Act in turn implemented the new Judicial Article to the Constitution of Alabama of 1901 (Amendment 328, approved December 18, 1973). Act No. 1205 created, among other things, a "unified judicial system for the state," and "amend[ed] various sections of the Alabama Code of 1958 and subsequent statutes as required to make effective the unified judicial system." Ala. Acts 1975, No. 1205, p. 2384. The 1975 *Code of Alabama*, which carried forward Act No. 1205, was adopted by the Alabama Legislature on February 15, 1977, in Act No. 20, Acts of Alabama, Regular Session 1977.

Amendment 328 to the Constitution of Alabama of 1901 (hereinafter "the Judicial Article") created the circuit court as a trial court of "general jurisdiction in all cases except as may otherwise be provided by law." § 6.03. Further, there was created a new "district court" which is a trial "court of limited jurisdiction." § 6.04. The circuit court has exclusive jurisdiction over divorce cases and other domestic relations cases. Ala. Code § 30-2-1. Section 12-15-2 (a) of the *Code of Alabama* (1975) provides that the "circuit court and the district court shall exercise original concurrent jurisdiction sitting as the juvenile court," but Section 12-15-3 (a) states that the "judge of the district court shall serve as the juvenile court judge in those districts having only one district

judge. In those districts having more than one district court judge, the presiding circuit court judge shall designate from time to time a district court judge or circuit court judge who shall serve as the judge hearing juvenile cases." In Etowah County, there are two district court judges and presiding circuit judge Julius S. Swann, Jr., has designated one of those district court judges, Robert E. Lewis, as the "judge hearing juvenile cases."

Section 5-104 of Act No. 1205, Acts of Alabama, Regular Session 1975, is codified at Section 12-15-6 of the *Code of Alabama* (1975), and appears in Chapter 15 of Title 12 entitled "Juvenile Proceedings," the same chapter of the *Code* which denominates the district court a juvenile court. Section 12-15-6 provides *in toto* as follows:

> (a) The judge may appoint one or more persons to serve as referees on a full-time or part-time basis subject to approval of the administrative director of courts. Referees shall be licensed to practice law in this state; provided, that referees serving as such for 10 or more years on January 16, 1977, will not be required to be members of the bar of this state.
>
> (b) The judge may direct that hearings in any case or class of cases be conducted in the first instance by a referee unless:
>
> (1) The hearing is one to determine whether a case shall be transferred for criminal prosecution; or
>
> (2) *A party objects to the hearing* being held by a referee.
>
> (c) Upon the conclusion of a hearing before a referee, he shall transmit in writing his findings and recommendations for disposition to the judge. Written notice of the findings and recommendations together with copies thereof shall be given to the parties to the proceeding. The written notice shall also inform them of the right to a rehearing before the judge.
>
> (d) A rehearing before the judge may be ordered by the judge at any time and shall be ordered if any party files a written request therefor within 14 days after receipt of the referee's written notice. Upon rehearing,

> when adequate records have been kept in the proceedings before the referee, the court shall review the record and, in the discretion of the judge, may admit new evidence. If the referee has not kept adequate records, the rehearing shall be de novo.
>
> (e) If a hearing before the judge is not requested or ordered or the right thereto is waived, the findings and recommendations of the referee, if confirmed by an order of the judge or as modified by the judge, shall become the decree of the court.

(emphasis added).

Section 12-15-6 authorizes a full-time, presumably state-paid, referee *in the juvenile court only*. At no place in Act No. 1205, or its codification, is there any mention of or authority for the creation or appointment of a full-time state-paid "Domestic Referee" or "Master/Referee" in the circuit court.

The only other provision of Act No. 1205 which deals at all with "referees" is Section 7-108, codified at Section 12-17-330 of the *Code of Alabama* (1975). Section 12-17-330 appears in Chapter 17 of Title 12 entitled "Circuit and District Court Personnel" and provides that "[d]istrict court judges may appoint, with the approval of the administrative director of courts, referees to serve in connection with juvenile cases. Referees must be licensed to practice law in this state." Again, the only authority is for *juvenile referees*, not domestic relations referees, *where the juvenile case is in district court*. Since the "Domestic Referee" here is allegedly appointed by the presiding circuit judge, not the district/juvenile judge, apparently with the "approval" of the administrative director of courts, Section 12-17-330 obviously has no application.

When the Alabama Administrative Office of Courts (AOC) "created" the position of Etowah County "Domestic Referee" as a "Court Referee I," at the specific request of the presiding circuit judge, it stated that the referee would "support both the Domestic Relations and Juvenile Courts of Etowah County." App. A-15. As to the definition of the position, AOC directed that "[i]n the juvenile division, work involves hearing routine cases in which the facts of the case are not in dispute. In the circuit civil division,

employees are involved in conducted hearings in contested divorce cases." App. A-15. There is no evidence whatever in the record of this case that the Etowah County "Domestic Referee" has ever conducted a hearing in any juvenile case. Higgins has described himself, in his complaint to the Bar which launched the present case, as "the Domestic Referee for the 16th Judicial Circuit Court of Etowah County." App. A-9. Providing for the "Domestic Referee's" ability to conduct juvenile hearings in "routine cases in which the facts are not in dispute" is nothing but a sham and an attempt to justify the creation of a position which is wholly and utterly illegal under the laws and constitution of Alabama and the United States.

The "Domestic Referee" of Etowah County is a permanent standing full-time state-paid referee who conducts *pendente lite*, contempt and modification hearings in domestic relations cases filed in Etowah County Circuit Court. Based upon the evidence adduced at those hearings, the referee himself enters what are purported to be judicial orders for continuing income withholding for child support, findings and recommendations in matters such as child custody and child support, visitation, alimony, property division, and awards of attorneys' fees in domestic relations cases. At the time of the underlying *pendente lite* hearing at which Garmon is alleged to have engaged in misconduct, contested domestic relations cases filed in circuit court were routinely set for *pendente lite* hearings by and before the "Domestic Referee" without any referral or order of reference to that referee by a circuit court judge, and contempt or modification petitions were routinely heard by the referee, again without a specific order of reference from a circuit judge.

Though the appointment, and AOC approval, speak of the position as a "domestic referee" or "court referee," the only provision under Alabama law which provides for a position even remotely analogous to the Etowah County "Domestic Referee" position is Rule 53 of the Alabama Rules of Civil Procedure (Ala.R.Civ.P.) dealing with masters. Indeed, "[a]s used in [the Ala.R.Civ.P.] the word 'master' includes a referee, an auditor and an examiner." Rule 53(a), Ala.R.Civ.P. *Ex Parte Mid-Continent Sys-*

*tems, Inc.*, 447 So.2d 717, 720 (Ala. 1984). As set out above, Sections 12-15-6 and 12-17-330 of the *Code of Alabama* (1975) apply only to referees to juvenile proceedings in district court and have no application at all to domestic relations cases in circuit court.

The advisory committee to the Alabama Supreme Court for the rules of civil procedure wrote that the "first sentence of Rule 53(a) [Ala.R.Civ.P.] differs from Rule 53, [Federal Rules of Civil Procedure] in its reference to courts to which this rule is applicable. The second sentence prohibits appointment of masters having an interest or a relative in the controversy. [citations omitted]. Matters relevant to federal maritime practice have been excluded. With these exceptions, the rule is identical to federal rule 53." Rule 53, Ala.R.Civ.P., Committee Comments (1990). "Cases interpreting the Federal Rules of Civil Procedure are authority in the construction of the Alabama Rules of Civil Procedure." *Bracy v. Sippial Electric Company, Inc.*, 379 So.2d 582, 584 (Ala. 1980).

The sections of Rule 53, Ala.R.Civ.P., which are relevant to this litigation read as follows:

> (a) Appointment and compensation. Each court to which these rules are applicable or the presiding judge in those courts having more than one judge, may appoint one or more standing masters for the court, and the court in which any action is pending may appoint a special master therein. No master, except by express or implied waiver of the parties or the attorneys, shall serve in any case wherein he is interested or related to any of the parties, a stockholder of a party or an attorney of a party within the fourth degree of affinity or consanguinity. *As used in these rules the word "master" includes a referee,* an auditor, and an examiner. *The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct.* The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and

within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. *A reference to a master shall be the exception and not the rule.* In actions to be tried by a jury, a reference shall be made only when the issues are complicated; *in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exception condition requires it.*[3]

* * *

(dc) District court rule. *Rule 53 does not apply in the district courts.*

Rule 53, Ala.R.Civ.P. (as amended to 1/1/90) (emphasis added).

Rule 53, Ala.R.Civ.P., by its terms cannot apply to the juvenile court since, in Etowah County, the juvenile court is a division of the district court and "Rule 53 does not apply in the district courts." Thus, the provisions of Section 12-15-6 and Section 12-17-330 and Rule 53 are mutually exclusive as applied to the Etowah County "Domestic Referee" or "Master/Referee:"

— Sections 12-15-6 and 12-17-330 apply only to juvenile proceedings in district court and not to domestic relations cases in circuit court, and

— Rule 53 can apply to domestic relations cases in the circuit court and not to juvenile cases in the district court.

A full-time "Master/Referee" to whom original divorce complaints, as well as contempt and modification actions in domestic relations cases, are submitted for hearing and determination as a matter of course without a specific order of reference is clearly not contemplated or permitted by Rule 53, Ala.R.Civ.P. "The rule clearly categorizes the appointment [of a referee or master] as an exceptional situation. Because of the increased costs, likelihood of delay, and possible lack of confidence in the outcome, the

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[3]All Alabama divorce cases, and ancillary proceedings to those cases, are tried to the court without a jury. Ala. Code § 30-2-1. *Watson v. Watson*, 497 So.2d 146 (Ala. Civ. App. 1986).

power to order a reference is to be sparingly exercised." Rule 53, Ala.R.Civ.P., Committee Comments.

The Etowah County "Domestic Referee" or "Master/Referee" scheme, though it may be couched in terms implying otherwise, is but merely a procedure for "reference" of all contested domestic relations cases, and post-judgment proceedings in other domestic relations cases, to a standing full-time referee. The referee, whether or not called such, appears to be within the sphere of operation of Rule 53, Ala.R.Civ.P. "Every reference to a master, no matter what the litigation incident involved may be, and regardless of what may be the form or scope of the task sought to be referred is within the application of the Rule." Fed. Proc., L.Ed. § 68:3 (1984). *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28 (8th Cir. 1966).

In an appropriate case, the trial court may legitimately appoint a master or referee in domestic relations cases and may appoint a clerk, register or deputy register as standing master or referee. *Harp v. Harp*, 462 So.2d 372 (Ala. Civ. App. 1984); Rule 53(a), Ala.R.Civ.P., and Committee Comments. But, since "reference to a master shall be the exception and not the rule," appointment of a full-time state-paid master or referee and reference to him of all contested domestic relations cases, without regard to the merits or issues in each individual case, is violative of the spirit, intent and letter of Rule 53(b). Fed. Proc., L.Ed., § 68:3 (1984). By operation of this rule, a master or referee, whether "standing" or "special," would act only pursuant to an order of reference from the circuit court since the power of the master is "completely dependent on the order of reference." *United States v. International Business Machines Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974). Rule 53(c), Ala.R.Civ.P. A reference to a master is only to aid judges in arriving at a just result regarding specifically defined areas of inquiry and not to displace the court or to undermine the court's ultimate role. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). Very broad issues should not be referred to a master or referee, *Mills v. Electric Auto-Lite Co.*, 403 F.2d 429 (7th Cir. 1968), vacated on other grounds, 396 U.S. 375 (1970). The parties are entitled to "try their cases in a court of law under the direction and control

of their judge." Fed. Proc., L.Ed., § 68:3, citing *LaBuy v. Howes Leather Co.*, 352 U.S. 249.

Since "references are frowned upon," *Ira S. Bushey & Sons, Inc. v. W. E. Hedger Transportation Corp.*, 167 F.2d 9 (2d Cir. 1948), and should be sparingly used, Fed. Proc., L.Ed., § 68:3, the wholesale referral of domestic relations cases to the "Domestic Referee" or "Master/Referee" of Etowah County is without the support of law, and is violative of the parties' right to due process of law. *Dairy Queen v. Wood*, 369 U.S. 469 (1962). *Ira S. Bushey & Sons v. W. E. Hedger Transportation Co.*, 167 F.2d 9 (2d Cir. 1948). Ala. Const., Art 1 § 13; U.S. Const. Amend. 14. " 'Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown.' *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 [(7th Cir. 1942)]." *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 257. The denial to the litigants of that right by the "unnecessary appointment of a master may amount to a denial of due process of law, [and the propriety of the appointment of a master] is to be tested by an appraisal of the facts in the case." Fed.Proc., L.Ed. § 68:3 (1984), citing *Dairy Queen v. Wood*, 369 U.S. 469. *McGraw-Edison v. Central Transformer Co.*, 308 F.2d 70 (8th Cir. 1962).

An inviting, but unavailing, comparison exists between the position Etowah County "Domestic Referee" and the United States Magistrate under the Federal Magistrates Act found in Title 18 and Title 28 of the United States Code. *See* 82 Stat. 1107, 93 Stat. 643. The similarities between the position of "Domestic Referee" and federal magistrate are that both are standing full-time positions, whose holders are paid from the public treasury, and who take references from judges of the court they serve. There, however, any similarity ends. The office of the federal magistrate is created by a public law of the Congress, Pub.L. 90-578, Pub.L. 96-82, and, by express act of Congress, magistrates are appointed by the "judges of each United States district court." 28 U.S.C. § 631 (a). The appointment of a full-time magistrate is for a term of eight years, 28 U.S. C. § 631 (e), and the magistrate may be reappointed for any number of terms subject to his satisfactory performance and subject to the mandatory retirement laws. 28

U.S.C. § 631 (d) & § 631 (i). The jurisdiction and powers of the magistrate are established by statute. 28 U.S.C. § 636. Even the reference, by general order, of cases to a United States Magistrate is subject to the restrictions on reference to "appropriate cases" and reference continues to the "the exception and not the rule." *Wingo v. Wedding*, 418 U.S. 461 (1974).

In *Mathews v. Weber*, 423 U.S. 261 (1976), this Court declined to "hold that a general rule requiring automatic reference in a category of cases does not comply with the mandate of Fed.R.Civ.Proc. 53(b) that 'reference to a master shall be the exception and not the rule,' made in nonjury cases 'only upon a showing that some exceptional conditional requires it.' " 423 U.S. at 272. The *Mathews* decision did not, however, change the law that a master may act only in matters ancillary to litigation not involving the actual adjudication of cases. *Wingo v. Wedding*, 428 U.S. 461. A referral to a master or referee still must be made only in exceptional cases and not routinely. *LaBuy v. Howes Leather Co.*, 352 U.S. 249. *United States v. Eastmount Shipping Corp.*, 62 F.R.D. 437, 440-441 (S.D.N.Y. 1974).

The position of Etowah County "Domestic Referee" was created out of whole cloth by the presiding judge of the 16th Judicial Circuit of Alabama and the Alabama Administrative Office of Courts. There is no statutory authority whatever for the position. The Etowah County referee apparently serves to the end of time and he is not subject to election by the voters as is every legally constituted judge in Alabama except municipal court judges.

The "Domestic Referee" adjudicates and takes action on the most fundamental issues of cases referred to him, viz: The entitlement of the parties to child custody, child support and visitation; all *pendente lite* issues; and the merits of contempt and modification petitions. There is no provision in either the Constitution of Alabama or the *Code of Alabama* which can be said to even remotely authorize or permit the creation, existence and operation of the Etowah County "Domestic Referee." By its continued extra-legal existence and operation, that referee acts in derogation of the rights of all persons who appear before him to a right to a trial of their cases before a duly qualified judge who serves and acts in conformity with the basic law of the United States and the

State of Alabama. In the cases in which he acts, the "Domestic Referee" does not "aid judges in the performance of specific judicial duties" but does wholly "displace the court" — a situation which was disapproved in no uncertain terms by this Court in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256. It is ludicrous to argue that the position of "Domestic Referee" is proper and constitutional because the State of Alabama created and has somehow legitimated that referee. The same rationale could be applied to the creation by the State of any official who, because of his acting with the authority of the State, could act with impunity to deprive the citizenry of its most basic rights. This Court cannot sanction the continued existence of this ill-conceived "Domestic Referee."

There is no question that the circuit courts of Alabama have the power and authority, by both the law of Alabama and the common-law, to refer appropriate cases to a master or referee. *Dundee Mortgage & Investment Co. v. Hughes*, 124 U.S. 157 (1888). *Newcomb v. Wood*, 97 U.S. 581 (1878). Ala. Const. Amend. 328 § 6.11. Rule 53, Ala.R.Civ.P. The blanket referral of cases, without regard to the existence of any "exceptional condition [which] requires it," Rule 53(b), Ala.R.Civ.P., amounts "to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." *LaBuy v. Howes Leather Co.*, 352 U.S. at 256. The creation of a full-time state-paid "Domestic Referee," in the absence of any statute, rule or constitutional provision for that creation, is clearly an action which deprives all the participants to litigation in which the referee acts of their rights to a trial before their fully-qualified judge. The referral of a case to an illegally and unconstitutionally appointed "Domestic Referee" is "an abdication of judicial responsibility not authorized by law and contravening the constitutional restrictions upon the exercise of judicial power," and while the referral of cases to the "Domestic Referee" will free the judge to perform other judicial duties thereby increasing the efficiency of the courts, the "admittedly desirable goal of reducing the burden of the backlog of cases in the trial courts does not compel ratification of an illegal reference. Efficiency is not more important than preserving the constitutional integrity of the judicial

process." *Aetna Life & Insurance Co. v. Superior Court of San Diego County*, 182 Cal. App. 3d 431, 227 Cal. Rptr. 460 (Cal. App. 4th Dist. 1986).

## III.

## LEON GARMON'S CONVICTION BY THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR, AND THE AFFIRMANCE OF THAT CONVICTION BY THE SUPREME COURT OF ALABAMA, FOR VIOLATING AN ATTORNEY DISCIPLINARY RULE PROSCRIBING CONDUCT WHICH IS "DEGRADING OR DISCOURTEOUS TO A TRIBUNAL" IS INVALID BECAUSE THAT "DOMESTIC REFEREE" BEFORE WHOM LEON GARMON ENGAGED IN THAT CONDUCT WAS NOT A DULY AND PROPERLY CONSTITUTED "TRIBUNAL"

The courts have held that a "tribunal" is a person, or a body of persons, who has authority to hear and decide disputes and has the authority to bind the parties to the disputes. *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 272 F.Supp. 748, 761 (S.D.N.Y.), reversed on other grounds, 385 F.2d 1017 (2d Cir. 1967), and the word "tribunal" implies an officer or body having authority to litigate matters. *United States v. Meyers*, 75 F.Supp. 486, 487 (D.D.C.), affirmed, 84 App.D.C. 101, 171 F.2d 800, 11 A.L.R.2d 1 (D.C.Cir. 1948). *Corpus Juris Secundum* defines a "judicial tribunal" as a body "officially assembled under authority of law, at the appropriate time and place for the administration of justice." 21 C.J.S. *Courts*, § 1 (1940).

An absolute requirement in each of these definitions is that the purported tribunal be organized and appointed under authority of law and that the tribunal have the legal authority and power to conduct its business and make decisions. Ronald Higgins holds his position as "Domestic Referee" or "Master/Referee" wholly without any legal authority, and, indeed, the creation, existence and function of that position is illegal and unconstitutional. Therefore, any purported "judicial action" taken by the referee, including a "hearing" or "decision," is a nullity and *void ab initio*.

The "Domestic Referee" or "Master/Referee" is not a "tribunal" and Leon Garmon thus cannot be said to have engaged in "undignified or discourteous conduct which is degrading to a tribunal" in violation of Disciplinary Rule DR 7-106(B)(2) of the Code of Professional Responsibility of the Alabama State Bar.

In the proceedings below in this case, Respondent Alabama State Bar relied on *State ex rel. Nebraska State Bar Association v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975), to support its contention that the "Domestic Referee" or "Master/Referee" is a "tribunal." The respondent in *Holscher* was the elected County Attorney for Scotts Bluff County, Nebraska, 230 N.W.2d at 77, and committed certain acts determined by the Supreme Court of Nebraska to be in violation of the Code of Professional Responsibility, if not the criminal laws, of the State of Nebraska.

The Nebraska State Bar accused Holscher of three violations of its disciplinary rules, vis:

1. That he did "conceal or knowingly fail to disclose that which he is required by law to reveal," in violation of DR 7-102(A)(3);

2. That he "knowingly made a false statement of law or fact," in violation of DR 7-102(A)(5); and

3. That he did "use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client," in violation of DR 8-101(A)(2).

The Nebraska court held that the "county board is a tribunal embraced with the gambit of DR 8-101." 230 N.W.2d at 80. As long as that duly elected and constitutionally authorized county board, the governing body of Scotts Bluff County, has authority to make decisions, decide disputes and has the authority to bind the parties to the disputes, it would seem obvious that such a board of county commissioners, being properly constituted and elected, is a "tribunal." 230 N.W.2d at 80. The situation in *Holscher* is not analogous to the instant case. In this case, the "Domestic Referee" or "Master/Referee" is not validly or properly appointed and is not acting within the law of Alabama. The attempted application of *Holscher* to this case begs the question of the referee's authority *vel non* and *Holscher* is of no benefit to the resolution of the case at bar.

*In re Mezzacca*, 67 N.J. 387, 340 A.2d 658 (1975), also cited below by the Bar, arose from "respondent's conduct as an attorney before an administrative review board conducting a [sheriff's] departmental hearing." 340 A.2d at 658. The New Jersey Court held that, as a matter of law, the review board was a tribunal within the meaning of the disciplinary rules, 340 A.2d at 659, and reprimanded the respondent for threatening the review board with criminal prosecution for holding the departmental hearing. The New Jersey Court was not presented with the question of the validity of the appointment of the review board or the actual authority of that board under its appointment. Further, the finding that the respondent in *Mezzacca* violated disciplinary rule DR 7-105 by threatening criminal prosecution negated any necessity of finding that the review board was a "tribunal" since a violation of that disciplinary rule is not dependent on misconduct before a "tribunal."

The Bar also urged that *State v. Turner*, 217 Kan. 574, 538 P.2d 966, 87 A.L.R.3d 337 (1975), supports its contention that Higgins, as "Domestic Referee," is a "tribunal." The Kansas Court held that its DR 7-106(C)(6) , which is the same as Alabama's DR 7-106(B)(2), prohibiting undignified or discourteous conduct which is degrading to a tribunal, is not unconstitutionally vague. 538 P.2d at 975. On the definition of "tribunal," the court wrote that lawyers are enjoined

> from engaging in undignified or discourteous conduct which is degrading to a tribunal. As to this requirement, respondent replies that he was not discourteous to the trial court. While the record in *Smith* [the case in which the misconduct occurred] does not reflect discourtesy or disrespect for the trial judge, as such, we believe that a "tribunal", as that term is contemplated by the Code [of Professional Responsibility], comprehends more that the judge himself; it includes the entire forum, the entourage, the setting in which the proceedings are being conducted. "Tribunal" is variously defined in both lay and legal dictionaries as the seat of a court; the place where justice is administered; a court or forum of justice.

538 P.2d at 971. *State v. Turner*, like the other cases discussed, is not appropriately considered in resolving this case. While the Kansas court does define a "tribunal," it seems axiomatic that before a tribunal or body can "administer justice," it must be properly and legally constituted under the law of the state in which it sits. If the body is improperly or illegally constituted or appointed, as is the case here, it is not a "tribunal" which has the authority to "administer justice."

In this case in the Alabama Supreme Court, Justice Houston wrote that "[e]ven assuming, however, that Higgins's appointment as a referee was not proper under Rule 53(b) [Ala.R.Civ.P.], and that that fact may have provided the defendant [in the domestic relations case] with a ground for appeal in that case, Higgins's status as a 'tribunal' within the meaning of DR 7-106(B)(2) was not affected," and "Higgins was acting as a 'tribunal' within the meaning of DR 7-106(B)(2) at the time of the incident in question." App. A-1. 24 Ala. Bar. Rep. 4289, 4292-4293. The court's decision and opinion completely ignores the legal truth that if Higgins' position of "Domestic Referee" was created, exists and is functioning in violation of the due process clause of the 14th Amendment to the United States Constitution, Article I, Section 13 and Amendment 328 of the Alabama Constitution of 1901, or Rule 53 of the Alabama Rules of Civil Procedure, or any combination of them, then Higgins, by definition, is not a "tribunal." A "tribunal," which the Alabama Supreme Court defines as the "seat of a court or the place where justice is administered, see *The American Heritage Dictionary of the English Language* (1969) and *Black's Law Dictionary* (5th ed. 1979)," App. A-2, 24 Ala. Bar. Rep. at 4291, must be organized or appointed under the authority of law and must have the legal authority and power to conduct its business and make decisions. *In re Letters Rogatory*, 272 F.Supp. at 761. *United States v. Meyers*, 75 F.Supp. at 487. 21 C.J.S. *Courts*, § 1.

If that court's definition of "tribunal" as the "seat of a court or the place where justice is administered" is carried to its logical, though admittedly absurd, conclusion, then the courthouse itself is a "tribunal" and any misconduct by an attorney, whether or not

related to that person's status as an attorney, within the courthouse or its curtilage would make the attorney subject to Bar discipline for "engag[ing] in undignified or discourteous conduct which is degrading to a tribunal." That court surely did not intend its broad sweeping definition to encompass a building and the court's apparent holding that an individual is a "tribunal" even when that individual is appointed unconstitutionally and illegally is likewise absurd. A "tribunal" can exist only when it is properly and legally constituted and appointed under the law of the state in which it sits. *State v. Turner*, 217 Kan. 574, 538 P.2d 966, 87 A.L.R.3d 337. If the purported "tribunal" is improperly or illegally constituted or appointed, as is the case here with Higgins, it is not a "tribunal" which has the authority to "administer justice." The Etowah County "Domestic Referee" is a non-entity and a legal nullity whose purported "orders" are void *ab initio*. The Etowah County "Domestic Referee" is not a tribunal. Garmon's conviction for "engag[ing] is undignified or discourteous conduct which is degrading to a tribunal" is improper as a matter of law and that conviction should be set aside and held for naught.

## CONCLUSION

The decision of the Supreme Court of Alabama affirming Leon Garmon's conviction for violating the attorney disciplinary rule prohibiting "undignified or discourteous conduct which is degrading to a tribunal" necessarily legitimates the position of Etowah County "Domestic Referee" or "Master/Referee." That court ignored Garmon's constitutional challenge to the creation, continued existence and operation of the full-time state-paid "Domestic Referee," which came into being and continues wholly without the support or authority of law. For Garmon to be found guilty of having violated that disciplinary rule by conduct before this illegal and unconstitutional referee is violative of his rights to due process of law since the referee is not a properly constituted "tribunal" before whom improper conduct is prohibited and may be punished.

The judgment of the court below should be reversed and set aside and this cause remanded to that court for the entry of a judgment in favor of Garmon and further declaring that the position of Etowah County "Domestic Referee" is unconstitutional and illegal in its creation and existence and that position now be abolished.

Respectfully submitted,

LEON GARMON
945 Forrest Avenue
Gadsden, Alabama 35901
(205) 543-3401

*Attorney at Law and*
*Petitioner in Pro. Per.*

January 8, 1991

# APPENDIX

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1990

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89-1223

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Leon Garmon
v.
Alabama State Bar

Appeal from the Disciplinary Board of the Alabama State Bar
(ASB-88-76)

HOUSTON, JUSTICE.

This is an appeal by respondent Leon Garmon, a licensed attorney-at-law, from a finding by the Disciplinary Board of the Alabama State Bar ("the Board") that he violated two Disciplinary Rules contained in the Code of Professional Responsibility, and from the Board's order that he be publicly censured. We affirm.

The complainant, Ronald C. Higgins, a domestic referee for the 16th Judicial Circuit (Etowah County) alleged that, while conducting a hearing in a domestic relations case, he was verbally abused by the respondent. Higgins specifically alleged that the respondent referred to one of his rulings as "idiotic" and "asinine"; that the respondent became argumentative; and that the respondent left the hearing room only after being threatened with physical removal by a deputy sheriff. The Board, after hearing the testimony of Higgins and others who were present when the incident occurred and after considering various exhibits, found the respondent guilty of engaging in "conduct that adversely reflects on his fitness to practice law," in violation of DR 1-102(A)(6), Code of Professional Responsibility, and of engaging in undignified or discourteous conduct which is degrading to a tribunal," in violation of DR 7-106(B)(2). Thereafter, during arguments concerning the appropriate punishment for the respondent, evidence of four prior disciplinary actions by the Board against the respondent was introduced; one of them involved an

assault and battery committed by the respondent on Higgins. The Board subsequently ordered that the respondent be publicly censured.

The respondent first contends that Higgins was not acting as a "tribunal" within the meaning of DR 7-106(B)(2) when the incident in question occurred and, therefore, that the respondent could not have violated that rule. The respondent argues that Higgins was not acting as a "tribunal" because, he says, the procedure set out in Rule 53, A.R.Civ.P., for the appointment of referees in domestic relations cases was not followed with regard to Higgins's appointment in that, he says, the "exceptional condition" requirement of Rule 53(b) was not satisfied and there was no order from the trial court appointing Higgins. The respondent further argues that the requirements of Rule 53(b) are generally not observed in domestic relations cases in Etowah County and that "routine" domestic relations cases are automatically assigned to Higgins without court orders.

Initially, we note that the respondent has presented no evidence tending to show that the requirements of Rule 53(b) are generally not observed in domestic relations cases in Etowah County or that "routine" domestic relations cases are automatically assigned to Higgins without court orders. This Court is bound by the record on appeal, and the record tends to show only that no order was entered by the trial court appointing Higgins as a referee in the case that gave rise to the incident in question. Even assuming, however, that Higgins's appointment as a referee was not proper under Rule 53(b), and that that fact may have provided the respondent with a ground for appeal in that case, Higgins's status as a "tribunal" within the meaning of DR 7-106(B)(2) was not affected. "Tribunal" is variously defined in both lay and legal dictionaries as the seat of a court or the place where justice is administered. See *The American Heritage Dictionary of the English Language* (1969) and *Black's Law Dictionary* (5th ed. 1979). Amendment 328 (Article VI), § 6.11, of the Alabama Constitution authorized this Court to promulgate rules governing the administration of, and the practice and procedure in, all of the courts of this state. Rule 53 specifically authorizes the appointment of referees to facilitate the resolution of domestic relations

cases in the circuit courts. Even a cursory review of Rule 53 shows that a referee acts as an arm of the circuit court and, in doing so, is vested with the authority to conduct hearings, compel the attendance of witnesses, impose certain sanctions, and make findings of fact and conclusions of law. Higgins was acting as a "tribunal" within the meaning of DR 7-106(B)(2) at the time of the incident in question.

We address only briefly the respondent's other contention — that the evidence presented to the Board was not sufficient to support its findings. In *Courtney v. Alabama State Bar*, 492 So.2d 1002, 1003 (Ala. 1986), this Court, quoting *Haynes v. Alabama State Bar*, 447 So.2d 675, 677 (Ala. 1984), set out the applicable standard of review in disciplinary proceedings:

> " 'Under the present rules of disciplinary enforcement, where the members of the Disciplinary Board hear the evidence and observe the demeanor of the witnesses, the Supreme Court, on review, will presume that the Board's decision on the facts is correct; and the disciplinary order will be affirm unless the decision on the facts is unsupported by clear and convincing evidence, or the order misapplies the law to facts.' "

Without a further recitation of the testimony, suffice it to say that our review of the record shows the Board's findings to be supported by clear and convincing evidence.

For the foregoing reasons, we hold that the Board did not err in ordering a public censure of the respondent. All lawyers, the respondent included, should conduct themselves at all times, both personally and professionally, in accordance with the highest standards of honesty, integrity, and civility.

AFFIRMED.

Hornsby, C. J., and Jones, Almon, and Shores, JJ., concur.

IN THE CIRCUIT COURT OF
ETOWAH COUNTY, ALABAMA
GADSDEN, ALABAMA

| | | |
|---|---|---|
| MARTHA E. WILLIAMS, | ** | |
| LEONARD WILLIAMS, JASON | ** | |
| WAYNE GRUBBS, MICHAEL | ** | |
| EUGENE MITCHELL, HAROLD | ** | |
| CECIL HALEY, BOBBY HUGH | ** | |
| TALLANT, DEBORAH FINNEY | ** | |
| EAGLY AND TIMOTHY | ** | |
| DALE WARE, | ** | |
| | ** | |
| PLAINTIFFS | ** | CIVIL ACTION |
| | ** | |
| VS. | ** | CV 88-552-JSS |
| | ** | |
| RONALD C. HIGGINS, | ** | |
| et al, | ** | |
| | ** | |
| DEFENDANTS | ** | |

FINAL JUDGMENT

In this case the Court has heretofore granted a motion to dismiss as to all the Defendants, except the Defendant Ronald C. Higgins. Because of results in other litigation and the decision of the Supreme Court in refusing to review the actions of the Chief Justice and Court management in creating the office which the remaining Defendant occupies, the Court is now of the opinion that the motion to dismiss should, also, be granted as to the remaining Defendant; it is therefore considered and adjudged by the Court as follows:

1. That the order of the Court denying the motion of the Defendant Ronald C. Higgins to dismiss this case is withdrawn and the said Defendant's motion to dismiss is now granted.

2. That cost herein are taxed to those Plaintiffs who have not previously withdrawn.

DONE this the 14th day of November, 1990.

/s/ Clark E. Johnson

CLARK E. JOHNSON, Jr.,
Special Judge

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 89-1223

| Leon Garmon | vs. | Alabama State Bar |
|---|---|---|
| Appellant | | Appellee |

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appeal _____ granted 7 additional days to file briefs to and including
_____ Appellant(s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed
_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No opinion.
XXXX Application for rehearing overruled. No opinion written on rehearing. Per Curiam — Hornsby, CJ., Jones, Almon, Shores & Houston, JJ., concur.
_____ Permission to file amicus curiae briefs granted

10/19/90
bsa

/s/ Robert G. Esdale,
Robert G. Esdale, Clerk
Supreme Court of Alabama

BEFORE THE DISCIPLINARY BOARD OF THE
ALABAMA STATE BAR

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | |
| MILFORD LEON GARMON, | ) | CASE NO. |
| | ) | ASB 88-76 |
| AN ATTORNEY AT LAW | ) | |

FINDINGS
AND
ORDER FOR PUBLIC CENSURE

The hearing in this matter having been held this date, as scheduled, and the Board having heard and considered everything presented by the State Bar as well as by the respondent attorney, the Board finds the facts to be as alleged in the disciplinary complaint, as amended, and the Board finds the respondent attorney GUILTY of Complaint One, Charge I and III, and NOT GUILTY of Complaint One, Charge II, and, after having considered the respondent attorney's prior disciplinary record, it is

ORDERED that the respondent attorney's discipline in this matter be set at a PUBLIC CENSURE for the two disciplinary rule violations, separately and severally.

This the 22nd day of March, 1990.

/s/ Robert M . Hill, Jr.

Robert M. Hill, Jr., Chairman
Disciplinary Board, Panel III
Alabama State Bar
215 West Alabama Street
Florence, Alabama 35630

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Mr. Allen W. Howell, counsel for the respondent attorney, P.O. Box 7367, Montgomery, Alabama, 36107; the respondent attorney, Mr. Leon Garmon, 945 Forrest Avenue, Gadsden, Alabama, 35901; and Office of the General Counsel, Alabama State Bar, 1019 South Perry Street, Montgomery, Alabama, 36104, by United States mail, postage prepaid, this the 10th day of April, 1990.

/s/ Robert M. Hill, Jr.

Robert M. Hill, Jr., Chairman
Disciplinary Board, Panel III
Alabama State Bar

A-9

CIRCUIT COURT
SIXTEENTH JUDICIAL CIRCUIT OF ALABAMA
GADSDEN, ALABAMA

February 4, 1988

Alabama State Bar
Center for Professional Discipline
1019 South Perry St.
Montgomery, Alabama 36104

Gentlemen:

I am the Domestic Referee for the 16th Judicial Circuit Court in Etowah County. As Domestic Referee, I conduct hearing son all petitions filed in divorce cases requesting pendente lite relief, or requesting post-divorce modifications or enforcement of divorce decrees. On January 5, 1988, I conducted a hearing as Domestic Referee, in the case of Hann vs. Hann, DR 87-806-JSS. After all the evidence had been submitted and both sides had stated that they had nothing further to submit, I began to make some comments pertaining to the findings I would make in the case. Mr. Leon Garmon, the attorney for one of the parties, interrupted me and in a loud voice and an insolent tone, began to insult me personally. I then stated to all persons present that I had nothing further to say and would announce my findings at a later date and requested that everyone leave. Both parties and the other attorney went to the door of my office to leave; however, Mr. Garmon continued to berate and insult me. Although Mr. Garmon never overtly threatened to physically assault me, I began to feel intimidated by him and told him unless he left that I would call for a deputy sheriff to remove him. When I finally put my hand on the telephone receiver, Mr. Garmon calmed down and finally left my office.

I consider the statements Mr. Garmon made and his actions to be a serious display of contempt for my position as Domestic Referee and a violation of Ethical Consideration EC 7-36 and Disciplinary Rule DR 7-106 (B) (2). If Mr. Garmon is allowed to show such contempt for my position during a formal hearing and

in the presence of parties to a court case pending before me, without incurring any disciplinary action, it will contribute to a lack of respect for my position as Domestic Referee and for the Court in general.

Thanking you in advance for your kind consideration to this matter, I am

Respectfully,

/s/ Ronald Higgins

Ronald Higgins
Domestic Referee

800 Forest Avenue
Gadsden, Alabama 35901
546-2821

# RULES OF CIVIL PROCEDURE

## Rule 53.

## Masters.

(a) *Appointment and compensation.* Each court to which these rules are applicable or the presiding judge in those courts having more than one judge, may appoint one or more standing masters for the court, and the court in which any action is pending may appoint a special master therein. No master, except by express or implied waiver of the parties or the attorneys, shall serve in any case wherein he is interested or related to any of the parties a stockholder of a party or an attorney of a party within the fourth degree of affinity or consanguinity. As used in these rules the word "master" incudes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) *Powers.* The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular arts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and

take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) *Proceedings.*

(1) MEETINGS. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) WITNESSES. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) STATEMENT OF ACCOUNTS. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a

party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) *Report.*

(1) CONTENTS AND FILING. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) IN NONJURY ACTIONS. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any part shall serve any written objections thereto upon the other parties. Applications to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) IN JURY ACTIONS. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) STIPULATION AS TO FINDINGS. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) DRAFT REPORT. Before filing his report a master may

submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(dc) *District court rule.* Rule 53 does not apply in the district courts.

# COURT REFEREE I

07910

## DEFINITION

This is professional legal work in conducting informal judicial hearings in juvenile and civil cases.

In the juvenile division, work involves hearing routine cases in which the facts of the case are not in dispute. In the circuit civil division, employees are involved in conducting hearings in contested divorce cases. In this class, employees are authorized by court rule to regulate the proceedings in these hearings including requiring the production of evidence, ruling on the admissibility of evidence, placing witnesses under oath as well as examining them. Work involves making independent determinations based on the testimony and evidence presented during the hearings. Determinations are made which affect the custody of children, amount of support, division of property and confinement of juveniles in detention facilities, or training schools, etc. At this level all determinations are reviewed by or appealed to a judge.

## EXAMPLES OF WORK PERFORMED

Acts as a court referee in juvenile cases; conducts preliminary and detention hearings involving the disposition, custody, control or protection of delinquent, dependent or neglected children; accept pleas of guilty and makes determinations regarding probation, length of sentence and place of confinement; drafts conclusions and recommendations and submits to all parties involved and to the judge for review.

Acts as a court referee in circuit civil cases; conducts reference primarily in divorce actions which involve making determinations regarding custody of children, visitation rights, amount of temporary support, division of property and financial assets; drafts conclusions and recommendations and submits to the judge for review.

Consults with parents, attorneys, employers, probation officers and various other local and state officials in regard to the disposition of cases.

Recommends changes in policies, rules and procedures in area of responsibility to the judge of the court, clerk or register.

Prepares correspondence and special reports.

REQUIRED KNOWLEDGES, SKILLS, AND ABILITIES

Ability to objectively examine witnesses and parties during a hearing and to analyze testimony and evidence and to arrive at logical conclusions.

Considerable knowledge of federal and state laws regarding the handling of juveniles, aid to dependent children, reciprocal nonsupport, unemployment compensation, food stamps, veteran's administration benefits and social security benefits, etc.

Considerable knowledge of court rules and procedures and rules of evidence.

Considerable knowledge of the application of legal principles to individual cases.

Ability to draft orders and findings of fact.

QUALIFICATIONS

A minimum of:

Ten years' experience as a court referee as provided in Section 5-104(a) of Act No. 1205, Acts of Alabama, Regular Session 1975.

or

Certificate of admission to the Alabama State Bar and experience at Attorney I level, or experience as a practicing attorney.

Rev. 3/85

Amendment No. 328

AMENDMENT OF ARTICLE VI.

Article VI of the Constitution of Alabama of 1901 as amended, and amendments 317 and 323 thereof, are hereby repealed and in lieu thereof the following article shall be adopted:

ARTICLE VI.

THE JUDICIAL DEPARTMENT.

6.01. Judicial power.

(a) Except as otherwise provided by this Constitution, the judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, a trial court of general jurisdiction known as the circuit court, a trial court of limited jurisdiction known as the district court, a probate court and such municipal courts as may be provided by law.

(b) The legislature may create judicial officers with authority to issue warrants and may vest in administrative agencies established by law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies are created.

* * *

6.04. Circuit Court.

(a) The state shall be divided into judicial circuits. For each circuit, there shall be one circuit court having such divisions and consisting of such number of judges as shall be provided by law.

(b) The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law. The circuit court may be authorized by law to review decisions of state administrative agencies and decisions of inferior courts. It shall have authority to issue such writs as may be necessary or appropriate to

effectuate its powers, and shall have such other powers as may be provided by law.

6.05. District court.

The district court shall be a court of limited jurisdiction and shall exercise uniform original jurisdiction in such cases, and within such geographical boundaries, as shall be prescribed by law, provided that the district court shall hold court in each county seat and at such other places as prescribed by law. The district court shall have jurisdiction of all cases arising under ordinances of municipalities in which there is no municipal court and shall hold court in each incorporated municipality of a population of 1000 or more where there is no municipal court at places prescribed by law.

* * *

6.11. Power to make rules.

The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided, further, that the right of trial by jury as at common law and declared by section 11 of the Constitution of Alabama 1901 shall be preserved to the parties inviolate. These rules may be changed by a general act of statewide application.

* * *

6.13. Election of Judges.

All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts.

* * *

6.15. Tenure of office.

(a) The term of office of each judge of a court of the judicial system of this state shall be six years.

(b) A law reducing the number of judges of the supreme court or of a court of appeals shall be without prejudice to the right of the judges affected to seek retention in office. The reduction shall become effective when a vacancy in the affected court occurs.

## JUVENILE PROCEEDINGS

§ 12-15-6. Qualifications and appointment of referees; conduct of hearings of cases by referees; transmission of findings and recommendations for disposition of referees to judges; provision of notice and written copies of findings and recommendations of referees to parties; rehearing of cases by judges; when findings and recommendations of referees become decree of court.

(a) The judge may appoint one or more persons to serve as referees on a full-time or part-time basis subject to approval of the administrative director of courts. Referees shall be licensed to practice law in this state; provided, that referees serving as such for 10 or more years on January 16, 1977, will not be required to be members of the bar of this state.

(b) The judge may direct that hearings in any case or class of cases be conducted in the first instance by a referee unless:

(1) The hearing is one to determine whether a case shall be transferred for criminal proceedings; or

(2) A party objects to the hearing being held by a referee.

(c) Upon the conclusion of a hearing before a referee, he shall transmit in writing his findings and recommendations for disposition to the judge. Written notice of the findings and recommendations together with copies thereof shall be given to the parties to the proceeding. The written notice shall also inform them of the right to a rehearing before the judge.

(d) A rehearing before the judge may be ordered by the judge at any time and shall be ordered if any party files a written request therefor within 14 days after receipt of the referee's written notice. Upon rehearing, when adequate records have been kept in the proceedings before the referee, the court shall review the record and, in the discretion of the judge, may admit new evidence. If the referee has not kept adequate records, the rehearing shall be de novo.

(e) If a hearing before the judge is not requested or ordered or the right thereto is waived, the findings and recommendations of the referee, if confirmed by an order of the judge or as modified by the judge, shall become the decree of the court.

# CIRCUIT AND DISTRICT COURT PERSONNEL

## Article 11.

## REFEREES.

### § 12-17-330. Appointment; qualifications.

District court judges may appoint, with the approval of the administrative director of courts, referees to serve in connection with juvenile cases. Referees must be licensed to practice law in this state.